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v.

MOSTAFA KAMAL ABADI

COURT OF APPEAL, PUTRAJAYA

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ABDUL MALIK ISHAK JCA

AZAHAR MOHAMED JCA

BALIA YUSOF WAHI JCA

[CRIMINAL APPEAL NO: N-05-24-02-2012]

15 JANUARY 2013

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CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1) - Trafficking - Accused charged for trafficking 371 grams of methamphetamine - Incriminating drugs found in right shoe - Inconsistency of statements regarding shoe brand and colour - Whether shoes produced in court were same as those seized - Whether there was break in chain of evidence - Whether defence cast reasonable doubt on prosecution's case*

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CRIMINAL PROCEDURE: *Appeal - Appeal against acquittal and discharge - Accused charged for trafficking in dangerous drugs - Incriminating drugs found in right shoe - Whether shoes produced in court were same as those seized - Inconsistencies of brand and colour of shoes in witnesses' statements - Inference by trial judge that there were two pairs of shoes - Whether trial judge correct in drawing inference*

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The respondent, an Iranian, was taken to a room for an examination upon arriving at the Kuala Lumpur International Airport. In examining the respondent's shoes, SP5 made a slight tear to the sole of the right shoe and discovered a transparent plastic packet containing crystalline substance which was later confirmed to be 371 grams of methamphetamine. SP6 prepared a search list ('P32') and a list of seized items ('P33') in which the pair of shoes ('P13A and B') was described to be grey colour, bearing the brand name 'Tabril Leather'. The respondent was charged for trafficking drugs, an offence under s. 39B(1) of the Dangerous Drugs Act 1952 ('DDA'). In his defence, the respondent argued that the shoes produced in court were not the ones recovered from him. The Judicial Commissioner ('JC') found that according to the prosecution witnesses, the colour of the

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- A shoes was grey and its brand name was ‘Dabriz Leather’ but exhs. P32 and P33 stated that it was ‘Tabril Leather’. Meanwhile, the respondent stated that the brand name was ‘Dabriz’ and that the shoes were blue in colour. The JC made an inference that there were two pairs of shoes seized from the respondent and
- B based on the inference, held that the respondent had successfully rebutted the presumption raised and had cast a reasonable doubt on the prosecution’s case. The respondent was acquitted and discharged. Hence, the present appeal by the prosecution. The sole issue for the court’s adjudication herein was whether the JC
- C was right in drawing an inference and making a finding that there were two pairs of shoes seized from the respondent.

Held (allowing appeal; setting aside order of acquittal and discharge)

- D **Per Balia Yusof Wahi JCA delivering the judgment of the court:**

- (1) The respondent had failed to rebut the presumption of trafficking on the balance of probabilities and had failed to cast a reasonable doubt on the prosecution’s case. The respondent was convicted for the offence under s. 39B(1)(a) of the DDA and was sentenced to death by hanging. (para 18)
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- (2) Upon examination of the shoes, the court found yet another different spelling of the brand name, which was ‘Tabriz Leather’ and that the colour was grey. The letterings were rather small and not easily decipherable. Comparison between the colours of the shoes with photographs tendered showed that the coloured photographs appeared to be slightly bluish. However, the shoes that were produced in court were the very same shoes seized from the respondent. (para 14)
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- (3) The JC had erred in drawing an inference that two pairs of shoes were seized from the respondent. Such an inference was in conflict with the evidence available. The evidence was overwhelming that there was only one pair of shoes seized and it was the very same shoes produced in court as exhs. P13A and B. The evidence clearly pointed to that and only that conclusion ought to be drawn or inferred. There was no break in the chain of evidence in respect of the drugs found and the shoes. (para 15)
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Bahasa Malaysia Translation Of Headnotes

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Responden, seorang warganegara Iran, telah dibawa ke sebuah bilik untuk pemeriksaan setibanya beliau di Lapangan Terbang Kuala Lumpur. Dalam memeriksa kasut-kasut responden, SP5 membuat sedikit koyakan pada tapak kasut kanan dan menjumpai satu paket plastik lutsinar yang mengandungi bahan kristal yang kemudiannya disahkan sebagai 371 gram methamphetamine. SP6 menyediakan senarai geledah ('P32') dan senarai barang-barang yang disita ('P33') dalam mana pasangan kasut tersebut ('P13A dan B') dinyatakan sebagai berwarna kelabu, dengan jenama 'Tabril Leather'. Responden dituduh mengedar dadah, satu kesalahan di bawah s. 39B(1) Akta Dadah Berbahaya 1952 ('ADB'). Dalam pembelaannya, responden menghujahkan bahawa kasut-kasut yang dikemukakan di mahkamah bukanlah kasut-kasut yang dirampas daripadanya. Pesuruhjaya Kehakiman ('PK') mendapati bahawa menurut saksi pendakwaan, warna kasut adalah kelabu dan jenamanya adalah 'Dabriz Leather' tetapi eks. P32 dan P33 menyatakan bahawa ia adalah 'Tabril Leather'. Sebaliknya, responden menyatakan bahawa jenamanya adalah 'Dabriz' dan kasut-kasut tersebut berwarna biru. PK membuat kesimpulan bahawa terdapat dua pasang kasut yang dirampas daripada responden dan berdasarkan inferens ini, memutuskan bahawa responden telah berjaya menyangkal anggapan yang dibangkitkan dan telah menimbulkan keraguan yang munasabah ke atas kes pihak pendakwaan. Responden dilepaskan dan dibebaskan. Oleh itu, rayuan ini oleh pihak pendakwaan. Isu yang perlu diputuskan oleh mahkamah adalah sama ada PK betul dalam membuat inferens dan dapatan bahawa terdapat dua pasang kasut yang dirampas daripada responden.

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Diputuskan (membenarkan rayuan; mengetepikan perintah pelepasan dan pembebasan)

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Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

- (1) Responden gagal menyangkal anggapan pengedaran atasimbangan kebarangkalian dan telah gagal membangkitkan keraguan munasabah ke atas kes pendakwaan. Responden disabitkan atas kesalahan di bawah s. 39B ADB dan dijatuhkan hukuman gantung sampai mati.

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- A (2) Setelah memeriksa kasut-kasut tersebut, mahkamah mendapati
ejaan lain bagi jenama tersebut, iaitu ‘Tabriz Leather’ dan
warnanya adalah kelabu. Huruf-huruf adalah agak kecil dan
tidak mudah dibaca. Perbezaan yang dibuat antara warna-
warna kasut dengan gambar yang dikemukakan menunjukkan
B bahawa gambar berwarna kelihatan sedikit kebiruan. Walau
bagaimanapun, kasut-kasut yang dikemukakan di mahkamah
adalah kasut yang sama yang telah dirampas daripada
responden.
- C (3) PK khilaf dalam membuat inferens bahawa dua pasang kasut
telah dirampas daripada responden. Inferens sedemikian
bertentangan dengan keterangan yang sedia ada. Banyak
keterangan bahawa hanya terdapat satu pasang kasut yang
dirampas dan kasut-kasut yang sama telah dikemukakan di
D mahkamah sebagai eks. P13A dan B. Keterangan jelas
menunjukkan itu dan hanya kesimpulan itu yang wajar dibuat
atau disimpulkan. Tidak terdapat pemutusan rantaian
keterangan ke atas dadah yang dijumpai dan kasut-kasut
tersebut.

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Case(s) referred to:*Loh Kah Loon v. PP [2011] 5 CLJ 345 FC (refd)**Su Ah Ping v. PP [1979] 1 LNS 100 FC (refd)**Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 SC
(refd)*

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Legislation referred to:

Dangerous Drugs Act 1952, s. 39B(1)(a), 39B(2)

*For the appellant - Mangaiarkarasi; DPP**For the respondent - N Sivananthan; M/s Sivananthan*

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*[Appeal from High Court, Seremban; Criminal Trial No: 2-45-12-2010]**Reported by Najib Tamby*

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JUDGMENT**Balia Yusof Wahi JCA:**

- I [1] The respondent is an Iranian. On 11 June 2010 at about
10.30pm he landed at the Kuala Lumpur International Airport and
had a baggage with him. His baggage was scanned by customs

officer SP3. There was nothing amiss. He was handed over to SP5 who took him to a room for further examination. In examining the respondent's shoes, SP5 made a slight tear to the sole of the right shoe and discovered a transparent plastic packet containing crystalline substance. The respondent was told to put on his shoes back and was handed over to SP6 and taken to the department's narcotics office at Nilai.

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[2] At the narcotics office in Nilai, a closer examination was made on the shoes by SP6 and a transparent plastic packet containing crystalline substance was found hidden under the soles of each shoes.

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[3] SP6 instructed photographs to be taken while SP7 prepared a search list, exh. P32 and Senarai Barang Yang Disita exh. P33. Both P32 and P33 were acknowledged and signed by the respondent. In both P32 and P33 the pair of shoes was described as "sepasang kasut warna kelabu yang dipakai OYDS bertulis Tabril Leather di bahagian bawah tapaknya". The shoes were tendered and marked as exhs. P13A dan B.

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[4] The exhibits were marked and later sent to the chemistry department for analysis which found it to contain 371g of methamphetamine for which the respondent was charged for trafficking, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") and punishable under s. 39B(2) of the DDA.

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[5] At the end of the prosecution's case, the learned Judicial Commissioner ("JC") found a *prima facie* case against the respondent and ordered him to enter his defence.

[6] The essence of the respondent's defence was that the shoes produced in court were not the ones recovered from him and he could not understand or knew what he signed when referring to exhs. P32 and P33.

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[7] The learned JC found the respondent to have cast a reasonable doubt on the prosecution's case and accordingly acquitted and discharged him.

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[8] Being dissatisfied with the order of the learned JC, the public prosecutor filed the instant appeal.

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- A **[9]** The only issue for determination in this appeal is whether the learned JC, on the evidence available was right in drawing an inference and making a finding that there were two pairs of shoes seized from the respondent by the customs officer on the day of his arrest (See p. 34 of the record of appeal Jilid 1). This
- B inference was made by the learned JC having taken into consideration the conflicting evidence regarding the identity of the pair of shoes marked as exhs. P13A and B tendered in court. Arising from this, His Lordship entertained a doubt as to whether the exhs. P13A and B were the same pair of shoes that were
- C seized from the respondent. Premised on that, His Lordship held that the respondent has successfully rebutted the presumption raised against him and has cast a reasonable doubt on the prosecution's case.
- D **[10]** The learned JC found that the identity of the shoes was established by the prosecution through its brand name and colour. All the prosecution witnesses SP3, SP5, SP6 and SP7 say that the colour of the shoes was grey and its brand name was Dabriz Leather. (See: pp. 52, 91 and 103 of the appeal record Jilid 1). However, exhs. P32 and P33 stated it was Tabril leather grey in
- E colour. The respondent in his defence also stated the brand name to be Dabriz and blue in colour. (p. 135 of the appeal record Jilid 1). The learned JC, however, in various parts of his judgment has referred to the brand name of the shoes as Debriz leather (pp. 13,
- F 14, 17, 35 and 36 of the appeal record Jilid 1) and the colour to be blue. In finding the colour with the shoes to be blue, the learned JC must have been influenced by the coloured photographs exhs. P4(11) and P4(12).
- G **[11]** On our part, we have taken the liberty to ask the prosecution to produce the shoes before us for our inspection. We have examined the pair of shoes (exhs. P13A and B) and found yet another different spelling of the brand name that is, Tabriz leather. We found the colour to be grey. We have compared the colour of the shoes with the photographs tendered and agree that
- H the coloured photographs appeared to be slightly bluish (exhs. P4(11) and P4(12)). Hence the observation of the learned JC. Both the learned deputy public prosecutor and the learned counsel for respondent have also examined the same pair of shoes and concurred with what we found. We also found the letterings to
- I be rather small and not too easily decipherable.

[12] With the greatest and most sincere respect to the learned JC, we found that His Lordship's conclusion reached at the end of the defence case goes against his own earlier finding where His Lordship had stated at p. 19 of the record of appeal Jilid 1 as follows:

Dengan hormatnya, berdasarkan keterangan saksi-saksi SP3, SP5, SP6 dan SP7, mahkamah mendapati mereka telah camkan kasut yang dikemukakan sebagai Eksibit P13A dan B secara pemeriksaan dan pemerhatian fizikal dan bukannya sahaja berdasarkan jenama atau warna.

Ini jelas menunjukkan bahawa hanya kasut itu yang dirampas daripada OKT dan tiada kasut lain selain kasut tersebut yang berada dalam kawalan dan jagaan SP7 sehinggalah ianya dikemukakan di mahkamah. Jesteru, tidak wujud inferens bahawa terdapat dua kasut yang berbeza jenama dan warna di dalam kes ini.

[13] The real question to be determined is whether the exhibits recovered by the customs officers in this case is the same exhibit subsequently produced in court and marked as exhibits. (See: *Loh Kah Loon v. PP* [2011] 5 CLJ 345)

Suffian LP in *Su Ah Ping v. PP* [1979] 1 LNS 100; [1980] 1 MLJ 75, at p. 76, said:

... In our judgment, if the officer who picked up an object at the scene produced it and identified it as that very object, that is enough ...

[14] We are satisfied and so was the learned JC (at least during the prosecution's case) that the shoes that were produced in court were the very same shoes that were seized from the respondent. The evidence of SP3, SP5, SP6 and SP7 have established the chain of evidence in respect of the same.

[15] We are of the view that the learned JC has erred in drawing an inference that two pairs of shoes were seized from the respondent. Such an inference is in our view in conflict with the evidence available. The learned JC himself had erroneously referred to the shoes as Debriz, when all the witnesses say Dabriz and so was the respondent. Exhibits P32 and P33 described it as Tabril

A and our own examination showed it to be Tabriz leather. Be that as it may, we are satisfied, and the evidence is overwhelming that there was only one pair of shoes seized from the respondent and it was the very same pair that was produced in court as exhs. P13A and B. The evidence clearly points to that and only that
B conclusion ought to be drawn or inferred. We are satisfied that there was no break in the chain of evidence in respect of the drugs found and the shoes.

C [16] We are mindful of the fact that an appellate court ought to be greatly influenced by the opinion of the JC who has had every advantage of seeing and hearing the witnesses. In appropriate cases, we are entitled to act upon our own view of the conflicting evidence. (See: *Yusoff Kassim v. Public Prosecutor* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376).

D A Court of Appeal has to bear in mind that its duty is to rehear the case and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it
E and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. (See: *Coghlan v. Cumberland* (1898) 1 Ch D 704).

F James LJ in the case of *Bigsby v. Dickinson* (1876) 4 Ch D 24 repeated what was said by the Court of Appeal in *The Glannibanta* (1876) 1 Ch D 283 as follows:

G A Court of Appeal cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.

H [17] We have given our utmost consideration over the matter and we strongly feel that this is one such case where we ought to interfere and make our own inference and conclusion. We feel impelled to overrule the learned JC.

I [18] For the reasons we have stated above, we hereby allow the appeal by the Public Prosecutor and set aside the order of acquittal and discharge made by the learned JC. The respondent

has failed to rebut the presumption of trafficking on the balance of probabilities and has failed to cast a reasonable doubt on the prosecution's case. The respondent is convicted for the offence under s. 39B(1)(a) of the DDA and punishable under s. 39(B)(2) of the DDA. He is sentenced to death by hanging.

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